

THREATENED AND ENDANGERED SPECIES

Following is a brief summary of the Federal and State Endangered Species Regulations and how they are to be applied in Michigan.

The Federal Endangered Species Act (ESA), 16 U.S.C - 1531-1544, is intended: (1) to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, (2) to provide a program for the conservation of such endangered species and threatened species, and (3) to take such steps as may be appropriate to achieve the purposes of international treaties.

The ESA's protections against "taking" threatened or endangered species and its formal duties for federal agencies to "conserve" such species apply only to those species that have been *listed* by the U. S. Fish & Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) as endangered or threatened. (The National Marine Fisheries Service has jurisdiction over marine species and most anadromous fish species.) **Our policy also recognizes threatened and endangered species that are listed by the appropriate state agency.** In addition to protections from taking and entitlement to conservation by federal agencies, listed species are also entitled to certain procedural protections that are discussed in this document.

Species "include any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature". Fish or wildlife means "any member of the animal kingdom" including mammals, fish, birds, amphibians, reptiles, mollusks, crustaceans, arthropods, and other invertebrates, and includes "any part, product, egg, or offspring thereof, or the dead body parts thereof."

Species that the FWS has ***proposed for listing*** are entitled to procedural protections under the ESA but they are not protected from "taking" until they are listed. ***Candidate species*** are those awaiting decisions from FWS on whether or not to propose them for listing. Candidate species have not formal procedural or takings protection under the law. (This also applies to *Species of Concern* listed by the Michigan Department of Natural Resources.) However, both proposed and candidate species may be the subject of candidate conservation agreements. (Discussed later)

In addition to listing species, the FWS must identify and designate for species the specie's "critical habitat". Critical habitat is that part of the species habitat occupied by the species at the time of listing that is "essential to the conservation of the species and which may require special management considerations or protection" and specific other areas not occupied by the species at the time of listing that are "essential for the conservation of the species." Recently, the FWS, identified the first critical habitat designation in Michigan. This was for the Piping Plover. This designation also gives rise to legal protections intended to prevent adverse modification to, or loss of, critical habitat.

The four duties that the ESA requires for NRCS can be summarized as the Four C's.
These are:

1. **Conserve**
2. **Consult**
3. **Confer**
4. **Can't Take**

Conserve

The NRCS must affirmatively use its authorities to carry out programs for the conservation of listed threatened and endangered species.

1. Conservation is the "use of all methods and procedures which are necessary" to recover listed species.
2. Courts interpret the conservation provision as an active, affirmative duty.
3. NRCS regulations provide that "NRCS district conservationist within the geographic range of threatened and endangered species will examine conservation district programs and NRCS operations to evaluate their effects on these species, and recommend to district officials and the state conservationist any action needed for their protection." 7 CFR 650.22(d) (5) For example, if NRCS becomes aware that as a result of its assistance, farmers are conducting land-disturbing activities at a critical time for the state listed threatened species Henslow's sparrow (*Ammodramus henslowii*), these NRCS efforts should be reevaluated and changed. In this context, NRCS could also provide DNR educational materials to farmers.
4. NRCS concern for conservation of species is not limited to those listed on the federal threatened and endangered list "but will include species designated by state agencies as rare, threatened, endangered etc." 7 CFR 650.22 (b).

Consult

The NRCS must consult with the FWS to ensure that any action authorized, funded, or carried out by the NRCS is not likely to jeopardize the continued existence of a listed species or result in the adverse modification of critical habitat (called "Section 7 consultation"). Jeopardize means "to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of the species" either directly or indirectly.

1. In making its determination about whether an action "may affect" a listed species or critical habitat, NRCS must identify whether any listed species may be present in the area of a proposed action. It should do so using the NFI database available through the internet. If a "no effect" determination is made after thoroughly assessing the presence of listed species and evaluating the action, it must be supported by sound evidence and documented on the MI-CPA-15.
2. Informal consultation between NRCS and FWS may be used to assist in determining whether threatened or endangered species are present and whether the proposed activity "may affect" them. It also assists in determining whether for consultation is necessary. Informal consultation can result in advisory recommendations on how to avoid adverse effects. If advisory recommendations are adopted, this may lead to a concurrence by FWS that the action is not likely to adversely affect the listed species or designated critical habitat.
3. NRCS may conduct a "biological assessment" (BA) to evaluate the potential effects on listed/proposed species and designated/proposed critical habitat. The BA is used to determine whether a formal consultation with FWS is required. A BA is always required for "major construction activities." A BA is always required to initiate formal consultation, but may not be required if FWS concurs through informal consultation that the action may affect but is *not likely to adversely affect* listed species or critical habitat.
4. As noted above, formal consultation between NRCS and FWS is **required** if an action "may adversely affect" a listed species or critical habitat and financial assistance is being offered to the landowner for implementation of the practice, or NRCS is itself undertaking the action. Once formal consultation is initiated, NRCS cannot take any irreversible or irretrievable

commitment of resources that would limit the ability to create reasonable and prudent alternatives to the proposed action.

5. The FWS concludes formal consultation by issuing a "biological opinion" (BO). The BO states whether or not the action is *likely to jeopardize* the continued existence of the species or result in adverse modifications of critical habitat. If the BO finds jeopardy or adverse modification, it must suggest reasonable and prudent alternatives that do not do so. A "jeopardy opinion" means that the action cannot proceed as proposed without modifications. In some instances, jeopardy opinions may have no reasonable alternatives to offer, and the action simply cannot proceed.
6. If the BO finds that the approved action or reasonable and prudent alternatives *will not jeopardize* the continued existence of the species, but that it may result in the incidental taking of some individuals of the listed species, the FWS will provide an "incidental take statement." The incidental take statement specifies the impact on the species, reasonable and prudent measures to minimize the impact of the action, and the terms and conditions that must be complied with to implement these measures. Provided that the terms of the incidental take statement are complied with, the recipient of the statement is insulated from liability under the Endangered Species Act even if the activity does result in harm or death to individuals of the listed species.

Confer

The NRCS is legally required to confer with the FWS on any agency action likely to jeopardize the continued existence of a species ***proposed for listing*** and/or to destroy or adversely modify proposed critical habitat. Such conference consists of informal discussions resulting in advisory recommendations.

The FWS provides for both formal and informal conferences. Formal conferences are used when there is likely jeopardy, and result in a conference opinion (which follows the format of a BO). NRCS must confer but has no legal obligation to prevent jeopardy or withhold a commitment of resources pending the conference. Nonetheless, conference offers a significant opportunity to avoid problems that may arise after a proposed species is listed.

The FWS also offers informal conferences, resulting in a conference report containing recommendations for reducing adverse effects. Again, the legal prohibitions come into effect after the species or habitat has been listed. Informal conferences can result in candidate conservation agreements.

Can't Take

It is unlawful for any person to "take" any endangered fish or wildlife species wherever located, or to remove or maliciously damage or destroy any endangered plant species from areas under federal jurisdiction, or to remove or damage or destroy an endangered plant in knowing violation of state law or in violation of state criminal trespass law.

1. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.
2. Harm includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering."

3. Any "person" includes employees of federal, state, and local agencies as well as any other person.

Private landowners are not subject to requirements to conserve, consult, or confer with FWS. However, they are criminally liable if they violate the "can't take" provision of Section 9 of the ESA. Thus, NRCS should work hard to assure that landowners receive good advice and technical assistance and that they are aware of threatened and endangered species issues.

In addition, the potential liability of private landowners for "taking" listed species makes it all the more important for NRCS to carry out our obligations with respect to our programs and provisions of cost-share assistance.

When NRCS is providing financial assistance and has fully consulted with the FWS, the Biological Opinion covers the landowner's activities. When NRCS is simply providing advice to the landowner, the landowner may need help recognizing potential endangered species issues in order to avoid a "take" since NRCS will not ordinarily have engaged in a formal consultation with FWS. NRCS can also advise private landowners of the following three conservation options available to them where threatened or endangered species may be an issue:

Habitat Conservation Plans

Although the ESA prohibits "take" of a listed species, a non-federal landowner may obtain an "incidental take permit" under Section 10 of the law. An incidental take permit must be based on a Habitat Conservation Plan (HCP). The HCP spells out activities that the landowner will undertake to conserve and restore listed species and their habitats, and is designed to allow lawful landowner activities to continue while minimizing impact on listed species and mitigating such impact "to the maximum extent practicable." An incidental take permit pursuant to an HCP must not appreciably reduce the likelihood of the survival and recovery of the species in the wild, must assure that the applicant has sufficient funding in place for the plan, and includes measures deemed necessary or appropriate by the FWS.

Safe Harbor Agreement

Safe Harbor Agreements are intended to provide incentives for non-federal landowners to take voluntary actions on private property to maintain and enhance habitat for listed species. In exchange for these actions by the landowner, the FWS commits that it will not enforce ESA prohibitions in the future - beyond what was already agreed to - that would limit landowner obligations affecting the enhanced populations and habitat resulting from the voluntary actions. Under the Safe Harbor Agreements, the FWS authorizes "incidental take" of listed species on property over and above the baseline at the time of enrollment in the agreement.

Candidate Conservation Agreements with Assurances

Candidate Conservation Agreements are formal agreements between the FWS and non-federal landowners to address the conservation needs of species **prior** to their listing. Candidate species include those under consideration by the FWS and for a future proposed listing, not simply species already proposed for the list and awaiting final listing. Participants in Candidate Conservation Agreements commit to actions that will reduce threats to the species covered by the agreement and contribute to their recovery.

The agreements are designed to help forestall the need to list species by promoting conservation. Also the agreements assure that, in the event of later listing of the species, landowners are not prohibited from actions that take species above the population baseline provided in the agreement. This assurance uses a provision in the Endangered Species Act that allows FWS to authorize "takes" in connection with actions "to enhance the propagation or survival of the affected species."

MICHIGAN'S PROCESS

The Endangered Species Act of the State of Michigan (Part 365 of PA 451, 1994 Michigan Natural Resources and Environmental Protection Act) is very similar to the Federal law. The state list includes Endangered, Threatened, and Extirpated species that are protected under the Act. The state also identifies Special Concern species. Special Concern species are not afforded protection under the Act.

The act is administered through the Endangered Species Program of the Michigan Department of Natural Resources. The Michigan Natural Features Inventory (MNFI) maintains information on these species and their occurrences. As of July 2000, MNFI became a program of Michigan State University Extension who is responsible for the maintenance of this database.

To determine if a landowner's planned activities may impact Threatened or Endangered Species, a review of the database of known occurrences or knowledge of the species specific habitat requirements is needed. Generally, listed species are not associated with intensively managed agricultural areas such as row crops, hayland or orchards. To search the known occurrence database, the Section, Township, Range, and County of the parcel is required. Requests by email to search the database are available through the website at www.mnfi.msue.msu.edu. Send written request to Michigan Natural Features Inventory, Information Request, P.O. Box 30444, Lansing, MI 48909-7944. Another alternative is to contact the NRCS State Biologist directly by email or letter. The State Biologist also has clearance to search the database.

For further information and guidance when assessing impacts on threatened and endangered species, contact the NRCS State Biologist.